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ANTITRUST SUITS BY FOREIGN NATIONS

*Lawrence R. Velvel**

The purpose of this nation's antitrust laws is to promote competition in American commerce.¹ But although the Sherman and Clayton Acts specifically cover foreign as well as domestic commerce,² surprisingly few occasions have arisen in which foreign nations or citizens, injured by violations occurring in United States foreign commerce, have brought suit against American corporations to recover for such injuries.³

Recently, however, foreign nations have brought suit on behalf of themselves and their citizens against United States corporations for antitrust violations. In the Antibiotic Cases, a massive, textbook example of antitrust litigation,⁴ five major drug companies have been accused of violating

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1. See, e.g., ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, FINAL REPORT 1 (1955).

2. For example, section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, or with foreign nations . . .", 15 U.S.C. § 1 (1970), while section 2 prohibits monopolizing, conspiring to monopolize, or attempting to monopolize "any part of the trade or commerce among the several states, or with foreign nations . . .", *id.* § 2.

3. It appears that the only prior antitrust cases involving a foreign nation as a plaintiff were part of the Electrical Equipment Antitrust Cases in the early 1960's. In these cases, the Republic of India, a corporation created by the Indian Parliament and wholly owned by the government, and several government-owned public utilities of the states of India joined as plaintiffs. Although these cases were settled prior to trial, preliminary motions to dismiss plaintiffs for lack of standing were filed, argued, and denied. For a general discussion of the Electrical Equipment Antitrust Cases, see Watkins, *Electrical Equipment Antitrust Cases—Their Implications for Government and for Business*, 29 U. CHI. L. REV. 97 (1961).

4. The Antibiotic Cases have involved over 160 plaintiffs, including nearly every state in the Union, insurance companies, health and welfare plans, competitors of the defendants, and foreign nations. Many of the cases have already been settled, see, e.g., *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 87 (1971) (\$100 million fund established settling large number of claims), while a number of cases are currently at trial in the United States District Court for the District of Minnesota, and still others are in the pretrial stages.

the antitrust laws in their sale of broad spectrum antibiotic drugs. In addition to a wide variety of domestic plaintiffs, several foreign nations have joined the litigation.⁵

Besides the numerous procedural⁶ and substantive⁷ issues already involved, the participation of foreign nations in the Antibiotic Cases has given rise to two questions which until now have been exceptionally rare or even novel in American antitrust jurisprudence. The first is whether a foreign government is a "person" within the meaning of section 4 of the Clayton Act⁸ and can therefore recover treble damages for violations of the antitrust laws. The second is whether a foreign government can sue as the official representative of claims of its nationals who are clearly "persons" within the meaning of the Clayton Act.⁹

While these questions have been extremely rare in the past, they are extremely important to a determination of the reach of the antitrust laws. Their significance is heightened by the probability that violations of the antitrust laws have been reasonably widespread in foreign commerce, especially since the advent of multinational corporations. Moreover, the fact that nine foreign governments brought suit in the Antibiotic Cases,¹⁰ the first time a significant number have ever done so, indicates that in the future sovereign governments may wish to pursue an antitrust remedy against violations of law which have caused harm to themselves and their citizens.

United States District Judge Miles W. Lord¹¹ has decided both the "person" and the official representative questions in favor of the foreign governments. In ruling on the "person" issue in 1971, the court in *In re Antibiotic Antitrust Actions (Kuwait v. Chas. Pfizer & Co.)*¹² stated that there

5. Kuwait became the first foreign government to sue in the Antibiotic Cases when it filed its complaint in 1969, and was followed by eight others between 1969 and 1974. See note 10 *infra*.

6. Procedural issues have included questions of venue, standing, class actions, and discovery. See, e.g., *In re Antibiotic Antitrust Actions*, 333 F. Supp. 267 (S.D.N.Y. 1971).

7. Plaintiffs' allegations included charges of price fixing, monopolization, and fraudulent procurement and misuse of patents. For a description of the background of this litigation, see *Chas. Pfizer & Co. v. Lord*, 456 F.2d 532, 533-35 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972).

8. 15 U.S.C. § 15 (1970).

9. *Id.* § 12.

10. The nine governments were India, West Germany, Spain, Vietnam, Columbia, Iran, the Philippines, Korea and Kuwait.

11. Sitting by assignment, Judge Lord of the United States District Court of the District of Minnesota heard the case in the Southern District of New York. Later, however, the case was transferred to Minnesota; hence, the appeal went to the Eighth Circuit. See note 12 *infra*.

12. 333 F. Supp. 315 (S.D.N.Y. 1971), *petition for mandamus dismissed sub nom. Chas. Pfizer & Co. v. Lord*, Civil No. 74-1680 (8th Cir., Aug. 27, 1975).

is little of relevance on the issue in the legislative history of either the Sherman or Clayton Acts; the real question, according to the court, "is whether the maintenance of the action is essential to the effective enforcement of the antitrust laws."¹³ Stressing that "the most important thing to keep in mind is the *result orientation* with which the [Supreme] Court has approached the whole area of private treble-damage litigation,"¹⁴ the court found that actions by foreign nations were essential to antitrust enforcement because of the close relationship between domestic and foreign markets.¹⁵ It found that a conspiracy to eliminate competition in foreign sales would adversely effect domestic competition; that domestic manufacturers could build up a "war chest" from excessive profits from foreign sales; and that "the fundamental goal of the antitrust laws could be seriously frustrated by not permitting the foreign government to maintain a treble damage action"¹⁶

The District Court decided the official representative issue in *Republic of Vietnam v. Chas. Pfizer & Co.*,¹⁷ in June 1974. Pointing out that it was not disputed that individual foreign citizens themselves have claims under section 4, the court ruled that damage suits by foreign governments on behalf of their citizens are not barred on the ground that domestic states of the union cannot sue to recover damages on behalf of their citizens.¹⁸ The court reasoned that suits by domestic states on behalf of individual citizens could subject defendants to multiple damages if and when the individuals also brought suit, but if the state's suit were held to bar individual claims, its suit might amount to a taking of citizens' property without due process. It was for these reasons that prior courts had been reluctant to permit domestic states to sue on behalf of their citizens.¹⁹

The court pointed out, however, that these problems do not exist when a foreign nation asserts the damage claims of its citizens. The relationships between a foreign government and its citizens are not restricted by the

13. 333 F. Supp. at 316.

14. *Id.* at 316, quoting *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1087 (2d Cir. 1971).

15. 333 F. Supp. at 316-17.

16. *Id.*

17. Civil No. 74-1847 (D. Minn., June 17, 1974). When this article was written, the District Court's decision on the "person" and representative issues were being appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit's decision was handed down just before the article went to press. *Chas. Pfizer & Co. v. Lord*, Civil No. 74-1680 (8th Cir., Aug. 27, 1975). The decision is discussed in an addendum to the article.

18. *Id.* at 7.

19. *Id.* Domestic states, however, have recovered on behalf of their citizens in antitrust class actions. See *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971).

American Constitution.²⁰ In the Antibiotic Cases, foreign governments are asserting the right to litigate claims of their citizens and to "apply any proceeds from the litigation to the benefit of their citizens as a whole."²¹ Since the consequences of this are

that the claims may no longer be asserted by the individuals themselves, the defendants need no longer fear a double recovery. And since constitutional restrictions upon such takings by state governments do not apply to foreign governments, the reasons for denying states the power to bring such lawsuits do not apply to the case at hand.²²

This article will review the arguments supporting and opposing the standing of a foreign nation to bring suit. The first section will include the all-important economic arguments involved in addressing this question. The second section will detail the legal issues related to whether a foreign government can obtain recovery for its own injuries. The final portion of the article will discuss the issue of whether a foreign nation can obtain recovery for its citizens' injuries.

I. ANTITRUST, ECONOMIC, AND INTERNATIONAL PRINCIPLES BEARING ON SUITS BY FOREIGN NATIONS

Standing to bring an action for treble damages under section 4 of the Clayton Act is conferred upon any "person" within the meaning of the Act.²³ If the courts were to rule that a foreign government is not such a "person", then treble damage actions would be excised from the antitrust laws in regard to purchases by such governments. The segment of commerce in which actions would be precluded is a large and growing one, since today there are many nations with large public sectors performing business functions which previously were within the domain of private entities. Among such countries are India, Great Britain, the Scandinavian nations, West Germany, Israel, and France, a list which, particularly when further fleshed out, includes major allies and trading partners as well as vital underdeveloped countries. Included in the public sectors are such vital industries as medicine, steel, automobiles, and aircraft.

In addition, if foreign governments cannot sue as representatives of the antitrust claims of their citizens, then in effect treble damage actions will also be excised from another large share of foreign commerce represented by

20. Civil No. 74-1847 at 8.

21. *Id.* at 7.

22. *Id.*

23. Section 1 of the Clayton Act provides that the term "person" encompasses corporations and associations existing under or authorized by the law of any foreign country. 15 U.S.C. § 12 (1970).

purchases of foreign nationals. While foreign nationals clearly can maintain claims under section 4,²⁴ as a practical matter they are often unable to pursue such claims themselves. Extreme geographical distance, lack of the large amounts of money necessary to hire American antitrust lawyers (and lack of the necessary foreign exchange with which to pay them), ignorance of antitrust laws, language difficulties, and other factors combine to preclude suits by all but the wealthiest and most sophisticated foreign individuals and corporations.²⁵ The question thus arises whether it is consistent with antitrust, economic, or diplomatic policy to excise treble damage actions from a major share of United State foreign commerce.

A. Antitrust Principles

The Supreme Court has stated that the "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."²⁶ Treble damage actions are a vitally important method of enforcing the antitrust laws; it is widely considered that they are the most effective of the various methods,²⁷ and, indeed, some feel that they are the *only* effective method.²⁸ Given the importance to the economy of antitrust

24. The Department of Justice has stated that "the right of foreign nationals, corporations and associations to maintain an action for treble damages has never been seriously contested." Brief for the United States as Amicus Curiae at 16, *In re Antibiotic Antitrust Actions* (Kuwait v. Chas. Pfizer & Co.), 333 F. Supp. 315 (D. Minn. 1971). Indeed, this right was not contested by the defendants in the Antibiotic Cases.

25. Even given the availability of American antitrust litigation to large foreign corporations and to most foreign governments for injuries suffered by the latter, for the vast bulk of foreign claimants resort to American courts would not be practicable. Thus foreign individuals, small and medium sized foreign businesses, such as importers or wholesalers, and other foreign nationals would be precluded from recovering damages. Even if American antitrust suits were within the reach of a great many more foreign nationals, it seems doubtful that more than a few of them could take the time and effort for repeated trips to the United States for the extended discovery that antitrust suits entail.

26. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

27. See, e.g., R. POSNER, *ANTITRUST CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 178 (1974).

28. For many years the antitrust laws have also been enforceable by jail sentences of up to one year, fines of up to \$50,000, and injunctions. 15 U.S.C. §§ 1-3 (1970). These means of enforcement, however, proved to be of little effect. The monetary penalties were so small as to be laughable in the eyes of multibillion dollar corporations, and jail sentences were rarely, if ever, imposed. Moreover, future injunctions held no terror sufficient to deter lucrative violations. *But cf.* H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973).

So inefficient were the existing penalties that Congress, spurred by rampant inflation in general and, more specifically, by a four-fold increase in the price of sugar within

principles and the vital nature of treble damage actions as a means of enforcement, the Supreme Court has repeatedly eschewed defenses which would vitiate the impact of treble damage actions across a wide spectrum of commerce. For example, in *Perma Life Mufflers, Inc. v. International Parts Corp.*,²⁹ the Supreme Court granted certiorari "[b]ecause these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States"³⁰ In reversing the lower court, the Supreme Court stated that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."³¹

Similarly, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,³² the Court struck down a defense which would have negated treble damage actions. It pointed out that permitting the use of the passing-on defense would result in suits having to be brought by those with

. . . only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court

a year, substantially increased the penalties for antitrust violations in the Antitrust Procedures and Penalties Act § 3, 15 U.S.C.A. §§ 1-3 (Supp. Feb., 1975), amending 15 U.S.C. §§ 1-3 (1970). The Act upgrades antitrust violations from misdemeanors to felonies, *id.* § 3(1); provides that the fine for corporations can be imposed up to \$1 million, *id.* § 3(2); provides that fines for noncorporate violators can be imposed up to \$100,000, *id.*, and that jail sentences may be increased to as long as three years, *id.* § 3(3). Whether this new law will be any more effective than the old one remains to be seen. A multibillion dollar corporation making tens or hundreds of millions of dollars from antitrust violations is no more likely to be deterred by a possible fine of \$1 million than by one of \$50,000. Similarly, if an executive is engaged in a violation so lucrative that he is not deterred by the possibility of a potential \$50,000 fine, he also may be undeterred by a possible \$100,000 fine. Finally, it is hard to see why the lengthening of potential jail sentences will necessarily make a difference. Most executives do not wish to go to jail for one day or one month, let alone for one year. Yet the previous one year potential sentence seems not to have been a deterrent since the risk that a jail sentence would actually be imposed was minimal. If judges were unwilling to sentence corporate executives to jail sentences when those sentences were a year or less, it is difficult to believe that they will now use their discretion to send white collar antitrust violators to jail for three years. Indeed, judges may now be more reluctant to impose any jail sentences at all, since the increase in allowable penalties would permit them to "sufficiently" punish antitrust violators by increased fines rather than by imprisonment.

29. 392 U.S. 134 (1968).

30. *Id.* at 136.

31. *Id.* at 139.

32. 392 U.S. 481 (1968).

has many times emphasized, would be substantially reduced in effectiveness.³³

Thus, antitrust principles espoused by the Court argue against permitting treble damage actions to be nullified in a vast area of foreign commerce. Moreover, given the possible ineffectiveness of other means of enforcement of antitrust policies,³⁴ such nullification might be viewed as tantamount to repealing the antitrust laws by implication in foreign commerce; repeal by implication, it need hardly be added, is highly disfavored in antitrust jurisprudence.³⁵

B. Economic Considerations

Since economic considerations are in significant part the moving forces behind the antitrust laws,³⁶ it would be helpful to determine whether important economic goals would be furthered or hindered by a rule that foreign nations cannot be plaintiffs in antitrust actions. It seems clear that a rule prohibiting treble damage suits by foreign sovereigns would not only fail to promote the economic goals furthered by the antitrust laws, but it would run contrary to them and could have an overall detrimental impact upon the domestic American economy.

Granting immunity from treble damage actions in a large share of foreign commerce encourages anticompetitive conspiracies, with monopolistically high prices, in such commerce. These high prices in foreign sales can contribute to world inflation, which may in turn contribute to inflation in the United States. For price levels in American export trade have a truly vast effect on price levels within other countries and in international trade in general, and the latter price levels in turn have a vital impact upon United States price levels. Given the rampaging nature of inflation throughout the world and the repeated calls by Congress, the President and other members of the executive branch for the use of antitrust as an important tool against inflation,³⁷ the times hardly seem propitious for an interpretation of the antitrust laws which would fuel inflation by encouraging monopolistic price-fixing conspiracies in foreign commerce.

33. *Id.* at 494.

34. *See* note 28 *supra*.

35. The Supreme Court has made it clear that exemptions from the antitrust laws will not be found by implication, but must be expressly stated by Congress. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). Moreover, even express exemptions will be narrowly construed to avoid limiting or repealing the scope of the antitrust laws more than is necessary. *See, e.g., Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

36. *See* M. HANDLER, H. BLAKE, R. PITOFKY, H. GOLDSCHMID, *CASES AND MATERIALS ON TRADE REGULATION* 1-16, 21-28 (1975).

37. *See, e.g., Legislative Outlook for the 94th Congress, ANTITRUST & TRADE REG. REP. No. 696, B1, Jan. 14, 1975.*

Another way in which inflation may be exacerbated by nullifying treble damage actions arises in situations in which companies possessing significant monopoly power feel able to and do conspire to fix prices in worldwide foreign commerce and are aided in establishing and maintaining a floor under a monopolistically high and inflationary price level within the United States itself. This result occurs because a worldwide conspiracy, so long as it remains effective, eliminates the possibility that foreign suppliers may seek to enter the American market with competitive prices that are beneath the existing domestic price level.

Finally, domestic inflation can be aided by a corporation's accumulation of a large "war chest".³⁸ If corporations are immune from damage actions on huge amounts of foreign sales, then such sales can be used to build enormous "war chests" for the purpose of establishing and policing domestic conspiracies and for defending them from antitrust attacks. The conspiracies so established will have an obvious inflationary impact on the domestic price level.

In addition to the battle against inflation, the achievement of other economic goals might also be endangered by immunizing conspiracies in foreign commerce. For example, purchases of American goods by foreign entities create a large volume of foreign sales vital to the economic health of the United States. But by encouraging monopolistically high prices on such sales, immunity from treble damage actions may diminish the American export market. Moreover, by causing a lessened foreign demand,³⁹ monopolistically high prices could be detrimental to the United States balance of payments.⁴⁰

38. See *In re Antibiotic Antitrust Actions* (Kuwait v. Chas. Pfizer & Co.), 333 F. Supp. 315, 316 (S.D.N.Y. 1971).

39. Export markets can be lessened even for commodities normally thought to be essential but which are obtainable only from domestic suppliers. Demand for a product is never completely inelastic; at some point the price of even an allegedly necessary product will be so high that buyers will forego its purchase. When sales abroad are at monopoly prices, then even though the monopolist may make more profit than under competitive conditions, his total revenue, and the total of United States foreign sales, may be less than under competitive conditions.

40. There is at least one other way in which the weakening of the antitrust laws, caused by excising treble damage actions of foreign nations, might be harmful to American economic interests. This concerns the question of confidence—that indispensable element so necessary to a high level of business activity. The questions of whether there can be redress when foreign nations and citizens have been harmed by a violation of the antitrust laws can be one measure of whether foreign governments, investors, and purchasers will receive fair and equal treatment under American law. If they feel confident of receiving generally fair treatment, they will be encouraged to invest much needed capital in the United States and to purchase goods and services here. Conversely, if they feel that foreign countries and citizens will not receive even-handed treatment,

C. Diplomatic Considerations

The Supreme Court has often stressed that principles of comity require that foreign governments be permitted to bring claims in the courts of the United States.⁴¹ So strong is the policy of comity that the privilege of bringing claims has even been extended to countries with which the United States has manifestly unfriendly relations, such as Cuba,⁴² and has been denied only to governments at war with the United States. A judicial denial of suit by foreign countries, the Court has said, is pregnant with sensitive political problems and the possibility of hindering the Executive in its conduct of foreign relations.⁴³

Principles of comity thus argue for permitting foreign governments to bring antitrust claims on their own behalf and on behalf of their citizens.⁴⁴ If this right were denied, foreign nations may take umbrage if they and their citizens could be mulcted by American corporations without hope of remedy, though domestic parties harmed in the same way by the same corporations could recover antitrust damages. Furthermore, the Congress and the Executive have themselves urged foreign nations to participate in measures against anticompetitive conduct, and the bringing of antitrust suits would certainly constitute such a measure. The Bretton Woods Agreement Act⁴⁵ urges foreign nations to take steps "which will best reduce obstacles to and restrictions upon international trade" and which will "eliminate unfair trade practices" in international trade.⁴⁶ Various treaties between the United States and other nations have urged aid-recipient nations "to take appropriate measures singly and in cooperation with other countries to eliminate public or private restrictive practices hindering domestic or international trade."⁴⁷ A similar policy is embodied in various aid agreements entered into by the United States.⁴⁸

foreign nations and their nationals may be reluctant to invest or purchase in the United States.

41. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964); *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870).

42. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

43. *Id.* at 408-12.

44. If it be argued that comity principles giving a right to institute suit do not entail underlying substantive principles giving a basis for recovery, the clear answer is that a procedural right to sue is useless without underlying substantive rights upon which to recover.

45. 22 U.S.C. §§ 286-286k-1 (1970).

46. *Id.* § 286k.

47. See, e.g., *Economic Cooperation Agreement with the Government of Vietnam*, Sept. 7, 1951, 2 U.S.T. 2205, 2207, T.I.A.S. No. 2346.

48. See, e.g., *The Treaty of Amity and Economic Relations with the Republic of Vietnam*, April 3, 1961, 12 U.S.T. 1703, T.I.A.S. No. 4890.

In view of such urgings, it would be a particularly inappropriate violation of rules of comity, and directly opposed to the foreign policies expressed by the political branches of government, for courts to close their doors to antitrust suits brought by foreign countries to remedy restrictive anticompetitive practices.

*D. Economic and Foreign Relations Reasons Against Permitting
Suits by Foreign Nations*

Retaliatory Action By Foreign Governments. Several major economic and foreign relations arguments have been suggested for denying foreign governments the right to bring antitrust damage suits. First, foreign governments could take various retaliatory steps to deal with antitrust violations from which they suffer, including seizures of goods, increases in tariff barriers, withdrawals of licenses to do business, and refusals to recognize patents. This proposal for retributive policies, however, may be an open invitation to economic chaos for other nations, for the United States, and for American corporations, including those multinational corporations which have sponsored the suggestion. One can imagine the havoc that would be created if, in retribution for having lost millions of dollars due to antitrust violations committed by multinational American corporations, foreign countries began confiscating these companies' assets, or denying them the right to do business.

A similar suggestion is that foreign nations could act by criminal or civil suits in their own courts. Even if such suits were practicable, however, the existence of such alternative remedies would not vitiate a foreign country's right to redress under American antitrust laws. Domestic states of the union have their own antitrust laws, but this does not prevent them from obtaining treble damages under the federal laws.⁴⁹

In any event, criminal or civil suits by foreign countries are often very impracticable. It can and does happen that anticompetitive activities, such as illegal patent actions and unlawful agreements to divide markets, take place entirely within the United States.⁵⁰ Also, in some instances the defendant companies are operated and located entirely within the United States, and the locus of their sales to foreigners is in the United States. In such cases, the foreign nations would find it difficult or impossible to obtain jurisdiction as a legal or practical matter. Even in cases in which it might be possible to

49. See pp. 20-22 *infra*, discussing rights of domestic states and the federal government to bring antitrust suits.

50. Because the anticompetitive conduct occurs so far from their shores, foreign countries may not even discover it until very late, if at all.

obtain jurisdiction, the witnesses and documents are in the United States, making it very difficult to conduct discovery or trial in a foreign land.

Differing Views Toward Antitrust. Another suggestion is that foreign countries should have no right of action under the antitrust laws because many of them have a very different view of competition and antitrust than does the United States. Of course, there are many foreign countries, including major allies and trading partners in the Common Market, with antitrust views similar to our own.⁵¹ Such countries should not be denied redress because there are other nations with differing views. If courts were somehow to devise the amazing rule that a nation is a "person" if it substantially agrees with our antitrust principles but not if it disagrees with them, then the judiciary would be given the impossible task of deciding the differing extents to which various countries agree or disagree with our notions of competition. This could only be productive of confusion and bad foreign relations. Furthermore, Congress' desire to protect foreign commerce under the antitrust laws indicates that, regardless of a foreign nation's view toward antitrust, the foreign commerce of the United States is best served by permitting recovery by a foreign nation.⁵²

Expansion of Liability. A further argument in opposition to standing for foreign governments is that it would result in an expansion of the damage liability faced by violators of the antitrust laws. Of course, in regard to foreign nationals, who clearly are "persons", there can be no doubt that defendants are already liable for damages. The only question is whether there can be a viable method for bringing the claims and collecting the damages.

The same argument regarding expansion of damages could have been made in regard to suits by domestic states, yet this did not preclude the

51. Except for Italy, all of the members of the Common Market have antitrust laws. For a general description of the impact of these laws on United States trade, see AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS 380-90 (1975).

52. The Department of Justice agrees with this position. See Brief for the United States Department of Justice as Amicus Curiae, Chas. Pfizer & Co. v. Lord, No. 74-1680 (8th Cir., Aug. 27, 1975) ("to the extent that restraints of trade are deterred by the threat of damage liability, american foreign commerce would be enhanced." *Id.* at 5).

In addition, a good deal of money could be saved by the United States if these suits were permitted. Foreign governments regularly buy American goods with money obtained through United States grant and loan programs or through participation in programs of agencies such as the International Bank for Reconstruction and Development, 20 percent of whose loan capacity derives from United States contributions. Permitting damage suits by foreign nations would increase the competition among American businesses which export commodities and would assure financial efficiency in the allocation of American dollars sent abroad through such programs.

Supreme Court from ruling that they are "persons",⁵³ nor did it stop the judiciary from permitting states to represent their citizens in class actions.⁵⁴ The possibility of recovering a large amount of damages should thus not defeat standing when excision of a remedy would conflict with Congress' desire to protect and stimulate commerce by ensuring the triumph of competitive principles.

If the size of damages precluded suit by plaintiffs, the result would be that the more widespread the violations of law, the less violators would have to pay. This perverse consequence would be contrary to Congress' decision that antitrust violators should pay treble damages for their violations.⁵⁵

Finally, it may be noted that, as a practical matter, the overwhelming preponderance of liability is likely to stem not from suits by foreign entities, but from suits by domestic bodies. This is because, in general, domestic entities are more likely to bring suit and because American corporations have greater sales in domestic commerce than in foreign commerce. In the Antibiotic Cases themselves, suits by domestic parties involved literally billions of dollars in potential damages.

Impact on Domestic Corporations and the American Economy. Another economic argument against recovery by foreign governments contains some of the same elements as the prior arguments that different countries have differing views toward antitrust and that recovery would cause an expansion of liability. The argument is that permitting recovery by numerous foreign governments would have a disastrous impact on domestic corporate violators and would result in money being taken out of the United States economy. This in turn would be detrimental to the public, and is to be avoided particularly in the current troubled state of the economy.⁵⁶

53. *Georgia v. Evans*, 316 U.S. 159 (1942).

54. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089-90 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

55. In this regard, the decisions in Securities Exchange Act cases concerning violations of rule 10b-5, 17 C.F.R. § 240.10b-5 (1975), provide an interesting analogue. After first implying a private remedy for rule 10b-5 violations, *see, e.g., Kardon v. National Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa.), *modified*, 83 F. Supp. 613 (E.D. Pa. 1947), the courts in later cases have interpreted the rule in such a way as to open defendants to damages of staggering amounts. It was estimated, for example, that the potential damage liability of the defendants in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), could be as high as \$400 million. *See Ruder, Texas Gulf Sulphur—The Second Round*, 63 Nw. U.L. Rev. 423, 428-29 (1968). In view of the fact that courts have exposed defendants to this degree of liability in a statutory scheme in which the remedy has been implied rather than expressed, it would certainly be inconsistent for the courts to be opposed to large damages in the context of the express damage provisions of the Clayton Act.

56. In the Antibiotic Cases, one member of the oil cartel, Iran, whose rapidly increasing prices caused serious harm to our economy, is currently a plaintiff. This raises

Chauvinistic as the argument may be, at first glance it has appeal to the American eye and ear. No American wishes to see harm befall our economy or even any particular American business. But further analysis reveals considerable weaknesses in this argument. In the first place, to the extent the argument contains the same elements as the "differing views" and "expansion of liability" arguments, the same answers apply. If domestic violators are hurt or money goes abroad because of the claims of foreign nationals, this occurs according to the mandate of Congress, which has clearly ordained that foreign nationals can possess antitrust claims. Congress has further ordained that United States foreign commerce will be best served by a regime of competition in our export markets, a regime furthered by treble damage recovery.

The claim of economic harm to violators is equally applicable to treble damage suits by domestic states, yet such suits are permitted.⁵⁷ Indeed, Congress enacted a treble damage remedy because the magnitude of the damages would deter violators; thus, unless Congress so decrees in the future, the size of damages should not be a reason to forbid a treble damage recovery. In any event, the alleged threat of harm to companies or the economy by foreign recoveries is vastly overblown. In cases involving huge domestic industries, the amounts recovered are likely to be only a small percentage of the defendants' income and assets. Additionally, even though export sales are vital to the economy, they are only a relatively small percentage of total United States economic activity.⁵⁸ The vast bulk of potential liability will thus continue to be in the domestic, not the foreign, area.

Finally, any claim of a widespread threat amounts to a defense that immunity must be granted because violations are so widespread. Bad enough in itself, such a defense comes with particular ill grace when corporations

the possibility of recovery by a nation which has harmed the domestic economy by anticompetitive conduct. Such a state of affairs might lead a court to think it masochistic to permit such a nation to recover. However, a blanket denial of standing to all foreign governments would approach throwing the baby out with the bath water; it would not only deny recovery to members of the oil cartel, but it would also penalize major allies and trading partners, such as West Germany, whose views of antitrust are similar to our own and who suffer at least equally at the hands of the oil cartel.

57. It is true that one reason the United States itself is limited to single damages for antitrust injuries is that treble damages might harm companies from which it is the major buyer—a rather common phenomenon in our economy. Foreign nations, however, are not nearly so likely to be the major buyer from a domestic corporation, and export sales are only a small percentage of our total economy.

58. See U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 373 (95th ed. 1974).

have made huge amounts of money by violating the law, and could have escaped liability simply by following the law.⁵⁹

Moreover, the second half of the argument, based on the removal of money from the economy ("removal-harm") by way of treble damage actions, requires an even stronger response, for it is at odds with the most basic economic principle concerning competition and antitrust. The basic economic principle which undergirds the antitrust laws asserts that the maximum amount of goods will be produced at the cheapest cost and price if there is competition in the economy. It is in this way that the maximum economic and social good is achieved. To the extent that economic performance is highly oligopolistic or monopolistic, less goods will be produced, with higher costs and prices and lessened social utility.

The short of the matter is that the economy in general and the economic health of individuals would be better served under competition than under some other regime. Nor do these principles stop at the water's edge. American export trade and world trade in general would be maximized by competitive behavior which gives full play to the comparative economic advantages possessed by the export industries of both the United States and other nations. If American goods are priced competitively, if they are priced in accordance with their costs instead of at a high and artificially fixed monopoly price, then more American goods will be sold abroad, with consequent benefits to the domestic economy. If American exports are priced at monopolistic levels, the amount of exports would eventually decline; at least it would be less than if competitive prices were in force.⁶⁰

In seeking to diminish the efficacy of competitive principles in American foreign trade, the "removal-harm" argument thus adopts a view concerning our economic welfare which is contrary to that adopted by Congress in the antitrust laws.⁶¹ It takes a view which is certainly incorrect in the long run,

59. Cf. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), in which the Court rejected the "passing on" defense because it would enable defendants to "retain the fruits of their illegality because no one was available who would bring suit against them." *Id.* at 494; *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (rejecting the *in pari delicto* defense).

60. An exception to this could occur when an American exporter possesses an absolutely essential product which foreign nations lacked the technology or materials to produce, or to produce in sufficient quantities. In that situation, foreign nations would have to choose between paying monopolistic prices or doing without the product. In the long run, however, the utilization of monopoly prices will give to foreign nations an increased incentive to discover the technology or to find alternative sources of materials so that they may become self-sufficient. The response of the oil importing nations to the current prices of petroleum is the most apparent recent example.

61. The Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1970), which excludes certain conduct of export associations from the reach of the Sherman, Clayton, and Federal

since it would stifle trade just as surely as it is stifled by taxes or tariffs which, like price fixing, raise the price of a product. Nor is it even correct in the short run, in these troubled times for the domestic economy. For whether we are thinking in broad terms of ways to enlarge our economy or in narrow terms of ways to pay for foreign oil, the goal must be to find methods of increasing exports, not stifling them. Indeed, with respect to United States industries which exhibit pronounced oligopolistic practices such as high and noncompetitive prices, it would be particularly ill advised to adopt rules which would be harmful to export trade by removing stimuli to competition, efficiency, and lower prices.

Additionally, in economic terms the "removal-harm" argument confuses cause and effect in regard to the difficulties now being experienced by the economy. It implies that economic troubles mean that an antitrust stimulus to competition should be negated, while in fact it is an absence of effective competition which is in some degree responsible for these troubles in the first place. As previously mentioned, anticompetitive price fixing conspiracies which establish a monopoly price in foreign commerce contribute to world and domestic inflation. Inflation in turn is partly responsible for decreased investment, increased unemployment, tight money and a variety of other economic ills. The way to cure this is not to encourage more of the very kinds of action which contribute to the trouble. The proper course is to discourage inflationary anticompetitive actions by encouraging suits which promote competition. Certainly this is the theory which has been advanced by the President and Congress in their calls for more effective antitrust enforcement, and also by economists and others who are regularly lambasting the regulatory agencies and the regulated industries for anticompetitive actions which raise the cost of living.⁶²

There are further deficiencies in the "removal-harm" argument. To contend that treble damage recoveries by foreign nations would drain the domestic economy neglects the fact that a third of those damages were unfairly brought into this country when foreign nations and their citizens purchased goods at artificially high prices from domestic corporations. Furthermore, a major portion of any recovery would often be spent in the United

Trade Commission Acts, constitutes a limited exception in which Congress apparently felt that a form of cartel would abet foreign trade and economic welfare. But the general rule, nevertheless, is that competition is the most effective way to maximize economic benefits in both foreign and domestic commerce. It is also noteworthy that, in a kind of reverse twist, the passage of the Webb-Pomerene Act was intended to reemphasize that, except when the Act applies, the normal antitrust rules shall prevail in foreign commerce.

62. See, e.g., Editorial, *Kicking Off Deregulation*, *The Wall Street Journal*, Feb. 7, 1975, at 6, col. 1; *The Wall Street Journal*, Feb. 7, 1975, at 7, col. 1.

States to purchase needed American goods and commodities.⁶³ Indeed, it might be possible for a court to guard against an outflow of dollars by requiring that recoveries be spent in the United States.

Finally, insofar as the "removal-harm" argument asserts that recovery by foreign nations is to be avoided in these troubled economic times, to this extent it rests upon economic vicissitudes. Clearly, as a legal matter, it is erroneous to classify a foreign nation as a "person" in good times but not in bad. It is either a "person" in both sets of circumstances or in neither. A temporary set of economic circumstances should not be a reason for denying recovery.

II. LEGAL PRINCIPLES BEARING ON WHETHER A FOREIGN NATION IS A "PERSON"

Whether a foreign government may sue as a "person" for treble damages based on its own injuries raises a host of legal questions. Arguments may be made on either side of the issue, and the result can depend upon the basic approach one takes toward the antitrust laws. If antitrust is perceived as a useful deterrent to anticompetitive conduct and therefore worthy of broad interpretation, there is ample support for a conclusion that foreign nations are legitimate antitrust plaintiffs. If, on the other hand, antitrust law is viewed as an unsatisfactory inroad upon businessmen's freedom of conduct, there is support for limiting the reach of antitrust laws. Given the generally accepted high place of the antitrust laws and competition in our economy, it seems that the more cogent reasons argue for holding that foreign nations can be antitrust plaintiffs.

A. *Lack of Congressional Intent to Exclude Foreign Governments*

The Statutory Language and its Legislative History. Among the arguments supporting a foreign nation's right to sue as a "person" are those which do so in a negative fashion, that is, by showing that Congress did not exclude foreign governments from the list of "persons" who can be plaintiffs or that Congress did not desire that the right of suit be narrowly confined. In this regard, section 4 of the Clayton Act provides a treble damage remedy to any person injured in his business or property by a violation of the antitrust laws,⁶⁴ and the word "person" is defined by section 1 of the Act to "include corporations and associations existing under or authorized by the laws of . . . any foreign country."⁶⁵ The wording of the section 1 definition places no limitation upon the word "person". It does not give a narrow, preclusive

63. Conversely, there can be no assurance that, when *domestic* plaintiffs recover, they will not use the money to purchase goods abroad.

64. 15 U.S.C. § 15 (1970).

65. *Id.* § 12.

definition; it does not say that the word person *means* certain entities and only those entities. Rather, it simply says that "person" is deemed to *include* certain entities, without excluding other entities. It has long been accepted that there is a significant difference between a statutory definition which says that a word shall *mean* a certain thing which is thereafter stated, and a definition saying that a word shall *include* certain entities.⁶⁶

It is thus clear from the statutory language that foreign governments are not excluded from the Clayton Act's definition of "person". The same inference can be drawn from the legislative history, for the exclusion of foreign governments from the definition of "person" nowhere appears in the history.⁶⁷

Congressional Action. A variety of congressional actions have indicated an intention that the right to sue to enforce the antitrust laws not be narrowly limited. For example, in 1904 the Supreme Court ruled in *Minnesota v. Northern Securities Co.*⁶⁸ that a domestic state could not sue for an injunction under the antitrust laws. Congress acted to reverse this restrictive reading of the antitrust laws by enacting section 16 of the Clayton Act, giving the right to injunctive relief to any "person, firm, corporation or association" threatened by a violation of the antitrust laws.⁶⁹

Another example of congressional action to reverse restrictive readings of the antitrust laws arose after the Court's decision in *United States v. Cooper Corp.*,⁷⁰ holding that the United States was not a "person" entitled to maintain suit under section 4 of the Clayton Act. This decision was overruled in 1955 by the enactment of section 4a of the Act,⁷¹ granting the federal government the right to sue for actual damages. The limitation of recovery to single damages was not, however, the manifestation of a congressional decision that suits by sovereigns generally did not require the recovery of treble recoveries; it was primarily a recognition that the United States,

66. See, e.g., *Helvering v. Morgan's, Inc.*, 293 U.S. 121 (1934), in which, in reference to section 200(a) of the Internal Revenue Code of 1926, the Court wrote that the terms "means" and "includes" are not necessarily synonymous The natural distinction would be where "means" is employed, the term and its definition are to be interchangeable equivalents, and that the verb "includes" imports a general class, some of whose particular instances are those specified in the definition.

Id. at 125 n.1. Cf. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 190-91 (1941).

67. See *In re Antibiotic Antitrust Cases* (*Kuwait v. Chas. Pfizer & Co.*) 333 F. Supp. 315, 316 (S.D.N.Y. 1971).

68. 194 U.S. 48 (1904).

69. 15 U.S.C. § 26 (1970).

70. 312 U.S. 600 (1941).

71. 15 U.S.C. § 15a (1970).

already charged with the obligation of enforcing the laws, did not need the additional spur of a treble damage recovery.⁷² At the same time, however, Congress recognized that other parties may need this spur to bring large, expensive and time consuming antitrust cases. Foreign governments, not legally charged with enforcing American antitrust laws, would be encouraged to bring suit if they were allowed to recover treble damages and attorneys' fees in an action brought under section 4 of the Clayton Act.

Since Congress has affirmatively acted to overrule decisions which *narrow* the right to bring suit, particularly serious import attaches to the fact that in 1914 Congress did not act to overrule decisions which had *permitted* suit by foreign governmental entities. Between 1890, when Congress first enacted the definition of "person" in the Sherman Act, and 1914, when it reenacted precisely the same definition in section 1 of the Clayton Act, a number of antitrust-type, unfair competition suits were brought in United States courts by foreign cities and nations.⁷³ Given this fact, one would expect Congress to have decreed in 1914 that a foreign government is not a "person" entitled to sue, if such had been the legislative wish. This reasoning is buttressed by the fact that 1914 was also the year in which Congress enacted the Federal Trade Commission Act,⁷⁴ banning acts of unfair competition, the very kinds of acts at issue in the foreign nation suits occurring between 1890 and 1914.

B. Congressional Intent to Include Foreign Governments

The Protection of Foreign Commerce. In addition to the foregoing points, there are also a number of positive points of statutory construction which demonstrate in an affirmative fashion that the word "person" does include foreign governments. To begin with, Congress clearly intended the antitrust laws to apply to the foreign commerce of the United States. Both section 1 and section 2 of the Sherman Act forbid anticompetitive acts in "commerce . . . with foreign nations,"⁷⁵ and section 1 of the Clayton Act defines commerce as encompassing "commerce . . . with foreign nations."⁷⁶ Today, of course, purchases by foreign governments directly as well as through foreign governmental entities constitute a large amount of United States

72. See S. REP. NO. 619, 84th Cong., 1st Sess. 3 (1965).

73. See, e.g., *French Republic v. Saratoga Vichy Spring Co.*, 191 U.S. 427 (1903); *La Republique Francaise v. Schultz*, 94 F. 500 (S.D.N.Y. 1899), *aff'd*, 102 F. 153 (2d Cir. 1900); *City of Carlsbad v. Kutnow*, 68 F. 794 (S.D.N.Y. 1895), *aff'd*, 71 F. 167 (2d Cir. 1895).

74. 15 U.S.C. §§ 41-58 (1970).

75. *Id.* §§ 1, 2.

76. *Id.* § 12.

foreign commerce. Congress' fundamental desire to protect foreign commerce thus indicates that foreign governments should be included as "persons" entitled to enforce the competitive norms of the antitrust laws through treble damage suits.

This logic is augmented by decisions in other fields. In determining whether the word "person" in other statutes includes governmental entities, the courts have not confined themselves to narrow, technical meanings. Rather, they have interpreted the word in accordance with the underlying objectives which Congress sought to attain.⁷⁷

Congressional Use of the Word "Any". Section 4 of the Clayton Act states that "any person" injured by a violation of the antitrust laws can bring suit.⁷⁸ The breadth of the word "any" indicates that the statute should be given a broad reading. As the Supreme Court asserted in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*,⁷⁹ when speaking of section 7 of the Sherman Act, the predecessor of section 4 of the Clayton Act, "[t]he statute does not confine its protection to consumers or to purchasers, or to competitors, or to sellers . . . [It protects] all who are made victims of the forbidden practices by whomever they may be perpetrated."⁸⁰

To give the statute a narrow reading which excludes foreign nations would make them the only jural entities or persons which are proscribed from bringing damage suits. This hardly seems consonant with the use of the words "any person" in section 4.

Suits by Foreign Corporations. As indicated above, the definition of "per-

77. See, e.g., *California v. United States*, 320 U.S. 577 (1944), which concerned the definition of "person" under the Shipping Act of 1916, 46 U.S.C. § 801-42 (1970). That definition parallels that of "person" under section 1 of the Clayton Act. The Federal Maritime Commission sought to exercise jurisdiction under the Act against the State of California and the City of Oakland. These governmental entities argued that they were not "persons" within section 801 and accordingly were not subject to the Act. The Court rejected that notion, stating:

We need not waste time on useless generalities about statutory construction in order to conclude that entities other than technical corporations, partnerships and associations are "included" among the "persons" to whom the Shipping Act applies if its plain purposes preclude their exclusion. The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers. California and Oakland furnished precisely the facilities subject to regulation under the Act, and . . . it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies.

320 U.S. at 585-86.

78. 15 U.S.C. § 15 (1970) (emphasis added).

79. 334 U.S. 219 (1948).

80. *Id.* at 236.

son" in section 1 includes corporations and associations organized under foreign laws. Many foreign governments carry out their commercial activities, such as purchases from American companies, through government-owned corporations organized under the laws of the particular nations. Unless a court is to disregard the clear meaning of the statutory wording, these corporations would be "persons" entitled to sue for treble damages under section 4.⁸¹ It would, therefore, be a totally incongruous result if suit could be maintained when the foreign government has determined to carry out its activities by organizing its purchasing entity in corporate form, but not when it has organized the same purchasing institution in some other form, such as a government agency. The anomaly is heightened because the decision of how to organize the entity has nothing to do with American antitrust laws, but only with factors such as funding, convenience, and local law. The only way to avoid the incongruity is to include foreign governments and their agencies as "persons" equally with the corporations which they own.

C. Arguments Against Including Foreign Governments

Treble Damage Suits by the United States. Foremost among the arguments against holding that foreign governments are within the protection of the antitrust laws is one derived from the Supreme Court's holding in *Cooper Corp.* There the Court held that the United States Government was not a person entitled to sue under section 4. From this result one might conclude that foreign governments likewise are not persons for purposes of the Clayton Act. However, just a year after *Cooper*, the Court in *Georgia v. Evans*⁸² decided that a domestic state is a person for purposes of section 4 of the Clayton Act. Since a domestic state can recover even though it, like a foreign state, is not specifically listed in the definition of "person" in section 1 of the Clayton Act, the *Evans* decision militates against giving the word "person" a narrow interpretation which excludes foreign nations.

More important, the *Evans* Court noted that the basis for the *Cooper* holding was that the United States did not need a damage remedy, since it already possessed far-reaching remedies for antitrust violations. The Court noted that domestic states do not have the varied arsenal of antitrust

81. Even if a court were to disregard the plain meaning of the statute and rule that a foreign government-owned corporation cannot sue because it partakes of the sovereignty of its creator, one must wonder at what point such a bar would arise. Is the corporation barred if it is 90 percent owned by the foreign government and 10 percent owned by private parties; if it is owned 60 percent by the government and 40 percent privately; 25 percent by the government and 75 percent privately?

82. 316 U.S. 159 (1942).

weapons possessed by the United States. Thus, unless a domestic state can sue for damages, it would be "den[ied] all redress . . . when mulcted by a violation of the Sherman Law, merely because it is a state."⁸³

A foreign government stands in no better position, and possibly in a worse position, than a domestic state in combatting antitrust violations. It cannot invoke a grand jury, initiate a prosecution, or seize assets in the United States. Unless it is a "person" within the Clayton Act, it cannot sue for an injunction under section 16 of the Act.⁸⁴ Even more than a domestic state, it lacks the ability to conduct an investigation in the United States. Thus, unless it is held to be a "person" entitled to sue under section 4, it would be left without remedies for antitrust violations. In short, the same considerations which led the *Evans* Court to permit state treble damage actions support permitting foreign governments to institute these suits.⁸⁵

Mutuality of Suit. A further argument in opposition to permitting a foreign government to sue as a "person" under the Clayton Act is that such a government cannot in turn be sued for treble damages under the antitrust laws. The syllogism that supports this position is: (1) to be a "person" entitled to sue for treble damages, an entity must itself be a "person" liable under the antitrust laws; (2) foreign governments are not liable under the antitrust laws; (3) therefore, foreign governments are not "persons" entitled to sue.

As with all syllogisms, the conclusion is only as sound as the premise and here the premise—that only those who are themselves suable as defendants may bring suit as plaintiffs—is fallacious. Antitrust jurisprudence has long recognized that an entity may sue for treble damages even if it cannot be sued for its own antitrust violations. This has been clear since *Parker v.*

83. *Id.* at 162-63. This may not be entirely true, since many states have their own antitrust acts and could presumably invoke the provisions of the local act against antitrust violators.

84. 15 U.S.C. § 26 (1970).

85. The state analogy is perhaps strengthened when the position of American municipalities is viewed. Municipal corporations have long been permitted to sue for treble damages. See *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906). This is partly because they are "corporations . . . existing under or authorized by the laws . . . of any State." 15 U.S.C. § 12 (1970), within the scope of section 1 of the Clayton Act. But at least as important, it would seem, is the fact that municipal corporations are even more defenseless against federal antitrust law violators than are the states which may have state antitrust statutes, since municipalities would normally lack municipal antitrust laws. Thus at least one rationale for suits by municipal corporations, their susceptibility to the depredations of antitrust violators, applies equally to foreign nations, since foreign countries would be hard put to enforce their own statutory remedies against violators.

Brown,⁸⁶ decided only a year after the Court in *Evans* permitted a domestic state to sue for treble damages.

In *Parker*, California's Director of Agriculture was authorized by state law to regulate the marketing of raisins within the state.⁸⁷ Although private raisin producers were members of the committee charged with formulating the marketing plan, the Supreme Court rejected the plaintiff's claim that the program was essentially private action.⁸⁸ It thus found that Brown's attack on the program as an illegal restraint of trade under the Sherman Act was an attack on state regulation.⁸⁹ The Court, in an opinion written by Chief Justice Stone, held that there was "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature,"⁹⁰ and the Court unanimously dismissed the antitrust claim.⁹¹ Thus, the combined result of *Parker* and *Evans* is that while states may not be sued for antitrust offenses, they may bring suit against others for similar offenses. It is difficult to see why domestic states would have this benefit while foreign states could not.

Furthermore, there may be some real question as to whether a foreign government is absolutely immune from suit under the antitrust laws. Total immunity, that is, immunity even for actions taken in a commercial rather

86. 317 U.S. 341 (1943).

87. Agricultural Producers Marketing Law, CAL. AGRIC. CODE §§ 59641-62 (West 1968).

88. 317 U.S. at 350.

89. *Id.* at 352.

90. *Id.* at 350-51.

91. *Parker* did not involve a particularly novel issue, see Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 6 (1972), since both the Supreme Court and lower courts had faced similar questions, and had drawn similar conclusions. In *Lowenstein v. Evans*, 69 F. 908 (D.S.C. 1895), a liquor merchant challenged South Carolina's state liquor monopoly under the Sherman Act. The court held that the Act applied only to private, not state, monopolies. In *Olsen v. Smith*, 195 U.S. 332 (1904), the Supreme Court rejected a challenge to a Texas statute which allegedly violated the Sherman Act by prohibiting unlicensed ship pilots from competing with licensed pilots. The Court held that "no monopoly . . . can arise from the fact that duly authorized agents of the State . . . perform the duties devolving upon them by law," *id.* at 345, and upheld the relevant portion of the Texas statute. It is worthy of note that, unlike *Parker*, the *Olsen* case was a challenge to the acts of private persons.

More recently, on June 16, 1975, the Supreme Court dealt with the so-called state action exemption in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). The Court ruled that the exemption did not apply to a minimum fee schedule for lawyers which was published by a county bar association and enforced by a state bar association. The basis of the ruling was that the fee schedule was not compelled by direction of the state acting as a sovereign. Thus the conduct under attack was mere private anticompetitive activity subject to the antitrust laws.

than a sovereign capacity, rests on the concept of absolute sovereign immunity, a concept discarded by the United States since the Tate letter of 1952.⁹² Today, the prevailing rule is that foreign sovereigns can be liable in United States tribunals for commercial acts.⁹³ It may therefore be quite possible to recover against a foreign sovereign or foreign government corporation which has committed antitrust violations in a commercial capacity.⁹⁴

III. FOREIGN NATIONS AS OFFICIAL REPRESENTATIVES OF THEIR CITIZENS

The other major procedural issue raised in the Antibiotic Cases in connection with foreign nations is the attempt by foreign governments to act as the official representative of the treble damage claims of their citizens. Similar to, but distinct from, *parens patriae* actions,⁹⁵ the official representa-

92. Letter from Jack B. Tate, Acting Legal Advisor of the Dep't of State, to Philip B. Perlman, Acting Attorney General, May 19, 1952 (26 Dep't State Bull. 984 (1952)), quoted in RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 69, at 213-14 (1965).

93. *Id.*

94. Although older cases refused to apply the Sherman Act to commercial acts of states, it is entirely possible that *Parker v. Brown*, 317 U.S. 341 (1943), would not shield a domestic state from liability for antitrust violations committed while acting in a private commercial capacity rather than a sovereign capacity. See Handler, *supra* note 91, at 14-15; cf. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 69, at 213-14 (1965). If this is so, the clear inference is that foreign nations would not be absolutely immune for antitrust violations committed in a commercial capacity and, to this not inconsiderable extent, mutuality of suit would prevail.

It should also be noted that the act of state doctrine has been applied to preclude suits on business actions forced upon private corporations by foreign governments. There are two reasons for these rulings. First, application of domestic law to acts ordered by a foreign nation might cause diplomatic difficulties with that nation and might intrude upon the executive branch's primary role in foreign affairs. See *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). Second, if they wish to do business in foreign lands, American businesses abroad must operate under the conditions established by their foreign hosts. See *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal.), *aff'd*, 461 F.2d 1261 (9th Cir. 1971), *cert. denied*, 409 U.S. 950 (1972).

The first consideration is inapplicable to suits by foreign nations; diplomatic problems would hardly occur when the nation itself has brought suit. Indeed, only the denial of permission to sue could raise diplomatic difficulties. See pp. 9-10 *supra*. The second reason—that a corporation's refusal to adhere to anticompetitive strictures of a foreign nation would preclude it from doing business in that nation—is obviously irrelevant when a foreign nation sues under American laws *because* of anticompetitive actions.

95. The term "*parens patriae*" is derived from two different contexts. In the first, it referred to the royal prerogative which the English monarch exercised over charities and incompetents. The second is of American derivation and was developed in the instance of suit by a domestic state in a quasi-sovereign capacity in order to protect its own interest. See Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust*

tive claim is a method under which the foreign nation will assert claims, and if successful collect damages, for antitrust injuries suffered by its citizens in their individual capacities.

The official representative suit is an effort to apply, in domestic judicial tribunals, principles of recovery that long have been applied in international judicial and quasi-judicial tribunals, as well as in international diplomatic channels. In the international arena, nations regularly espouse their citizens' claims, and the ultimate disposition of any monetary recovery is determined by the internal law of the recovering country.⁹⁶

A. *The Case For Official Representative Status*

The fundamental reason for the existence of governments is to protect the interests and welfare of their citizens. Thus, it long has been established that a sovereign government may act as the official representative of its citizens' claims in dealings with international organs and with instrumentalities of foreign nations.⁹⁷ So ingrained is this right that the United States itself has claimed the right to advance claims of its citizens without being requested to do so, has espoused claims without the citizens even being aware of it, and has asserted the right to espouse citizens' claims despite "vigorous opposition" by the citizens themselves.⁹⁸

Laws, 65 NW. U.L. REV. 193, 196 (1970).

As one might well expect, the plaintiffs' bar views *parens patriae* actions as a boon to consumer protection while the defendants' bar suggests that they are the source of much mischief. Compare Alioto, *Toward a More Effective Enforcement of the Antitrust Laws: Suits by the State as Parens Patriae*, 1969 BEVERLY HILLS B.J. 12, with Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415, 423-24 (1973) and Malina & Blechman, *supra* at 223.

96. See pp. 32-33 *infra*.

97. In ruling that a state could represent its citizens in the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice wrote that "[i]t is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through ordinary channels." *Greece v. United Kingdom* [1924] P.C.I.J., ser. A, No. 2, at 12. See I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2d ed. 1973) ("Customary international law still maintains the rule that it is the state which has the capacity to present international claims, even though in many cases the claim is substantially that of a private person." *Id.* at 572).

98. Fabian A. Kwiatek, Assistant Legal Adviser for International Claims in the Department of State, has stated that the government of the United States

can legally espouse on behalf of a national of the United States a formal claim through diplomatic channels and/or submit the claims for adjudication by an international arbitral tribunal without being requested to do so either formally or informally by the aggrieved national.

A. ROVINE, *DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW* 332 (1973). Mr. Kwiatek further said that such action can be taken by the United States despite "vigorous

It is true that the practical and legal facts of international life have caused official representative action to be taken mainly in the context of one nation pursuing its citizens' claims against another nation. As a practical matter, it can be most difficult for a private citizen to pursue a claim against a nation by dealing with the latter's executive or legislative arms; as a legal matter, under international law a private citizen has no standing to bring a case against a nation before an international tribunal. Thus, the private citizen's claim would die unremedied unless championed by that citizen's government. The sovereign's right to represent its citizens' claims is not confined to claims against another state, however, nor is a sovereign precluded from representing its citizens' claims in the courts of another country. On the contrary, as a matter of case law, sovereigns can represent, and have represented, their citizens' claims against private parties in the courts of other countries, including courts of the United States. This, for example, is precisely what was permitted by the Supreme Court in *The French Republic v. Saratoga Vichy Spring Co.*,⁹⁹ in which the Court pointed out that France was acting predominantly in a representative capacity.¹⁰⁰ Similarly, in *United States v. Diekelman*,¹⁰¹ the government of Prussia represented the claim of one of its citizens against the United States before the American judiciary.¹⁰²

opposition" by the aggrieved national, and he pointed out that the United States has settled many claims of its nationals against Eastern European communist countries without the nationals even being aware that their claims were being resolved. *Id.* at 332-34.

99. 191 U.S. 427 (1903).

100. The Court noted that "the French Republic has had no real interest in the product of the springs for fifty years, and [that] it can have no such interest for thirty years to come." *Id.* at 438. The Court thought the litigation was more accurately described as one in which the foreign nation was "suing for the use and benefit of" some of its citizens. *Id.*

101. 92 U.S. 520 (1875).

102. It has been asserted that there are two cases that bar the bringing of claims in the courts in an official representative capacity. One of these cases is *Diekelman*. The assertion regarding *Diekelman* is based on one portion of a sentence removed from context: "[T]he claim may be prosecuted as one nation proceeds against another, not by suits in the courts, as of right, but by diplomacy, or, if need be, by war." *Id.* at 524. When read in full context, it becomes clear that the Court held that a foreign government *can* represent its citizens in court in appropriate circumstances. The full context is as follows:

One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered.

Moreover, logic supports the case precedents. Since it is well established that a nation can represent its citizens' claims before the instrumentalities of foreign governments, it is a common occurrence for other countries to represent their citizens' claims before the executive and legislative branches of the United States Government. Since under our three-branch system of government the federal courts are as much an instrumentality of the government as the other branches, there would be little reason to permit foreign nations to represent their citizens' claims before the Executive and Congress while denying them that benefit before the judiciary.

In addition, representative action is logically as appropriate against private parties as against nations. Just as in the case of claims against nations, it can be impossible as a practical matter for individual foreign citizens either to deal effectively with private parties responsible for their injuries or to bring claims far from their homes. Thus, as with claims against nations, the claims of foreign citizens against private parties will die unremedied unless adopted

If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. . . .

. . . For all the purposes of its decision, the case is to be treated as one in which the government of Prussia is seeking to enforce the rights of one of its citizens against the United States in a suit at law, which the two governments have agreed might be instituted for that purpose.

Id. at 524-25.

The second case is that of *Republic of Iraq v. First Nat'l Bank*, 350 F.2d 645 (7th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966), which involved internecine family warfare in which Iraq tried to benefit itself and a paternal grandmother, whom it claimed to represent, at the expense of the interest of five children living in Chicago, whom it also claimed to represent but whose interests were in reality protected against Iraq's depredations by the First National Bank of Chicago upon appointment by the local probate court.

The court did not permit Iraq to represent the claims. In the context of the case the decision seems correct, particularly with regard to Iraq's desire to "represent" the five children residing in Chicago. This is a far cry, however, from saying that a nation should not be able to represent legitimately the claims of its citizens residing in its own country, when such representation would benefit citizens whose claims would otherwise expire. Furthermore, even the *Iraq* case recognized that representation of claims by a nation can be appropriate when the nation has an obligation to its general public to bring the claims. Foreign nations do feel political, legal, economic, and moral obligations to obtain redress for widespread injuries to their citizens. Additionally, Iraq further cited a line of domestic *parens patriae* cases as showing the type of interest a foreign nation must have in order to represent its citizens' claims. *Id.* at 649. As discussed below, *see pp. 28-30 infra*, foreign governments seeking to represent their citizens' antitrust claims meet the standards established by the *parens patriae* cases.

by their governments. In championing these claims, sovereignties act in pursuit of their right and duty to protect the interests of their citizens.¹⁰³

B. Protecting Foreign Commerce and the Claims of Foreign "Persons"

As discussed previously, Congress intended the protection of the antitrust laws to extend to the foreign commerce of the United States, and a foreign national is clearly a "person" possessing a claim under section 4 of the Clayton Act.¹⁰⁴ But since foreign nationals, businesses and citizens alike, often find it impossible as a practical matter to bring an antitrust suit in the United States, both the protection of foreign commerce and the claims of foreign nationals will be thwarted unless a foreign nation is permitted to exercise its inherent power to represent claims of its citizens.

C. The Case Against Official Representative Status—And Some Responses

A variety of reasons may be asserted for the position that a foreign government cannot sue as the official representative of the antitrust claims of its citizens. Among the reasons are that there has not been the requisite injury to its business or property; that the foreign nation is suing improperly as *parens patriae* and thereby is failing to observe the due process requirements of the class action rule; that the foreign government is impermissibly seeking fluid recovery; and that the foreign government has not formally expropriated its citizens' claims, allegedly a prerequisite to suing on them, and should not be able to recover even if it had expropriated the claims.

Injury to Business or Property. Section 4 of the Clayton Act requires that there be an injury to business or property in order to obtain treble damage recovery. There is no doubt whatever that foreign nationals who are harmed by violations of the antitrust laws are injured in their business or property within the meaning of section 4 and have a claim for this injury. An official representative suit literally represents the claims of these nationals, and their injuries thus suffice to permit suit under the statutory test, just as an assignee of an antitrust claim can sue on the basis of the injury to the business or property of the assignor.¹⁰⁵ Indeed, the real question is not whether there is

103. See Statement of David Gantz, Office of Legal Adviser, State Department, quoted in A. ROVINE, *supra* note 98:

The protection of nationals is not only the right, but the duty of the state, and such action does not constitute intervention so long as the protecting state is claiming rights . . . to which its nationals are entitled either under local law or under minimum standards of international law.

Id. at 334.

104. See p. 5 *supra*.

105. As with a suit on an assignment, the question of who keeps the proceeds of a

injury, but whether there will be effective means of obtaining recovery for the injury. An official representative suit is undertaken precisely so that there *will* be an effective means of recovery.

Distinguishing Official Representative Suits from Parens Patriae Actions. It is incorrect to assert that suit by a sovereign foreign nation in an official representative capacity cannot be undertaken because there could not be suit in a parens patriae capacity. The two must be distinguished. The concept of suit as parens patriae is indigenous to the power of domestic entities; its development in American jurisprudence was for the express purpose of allowing domestic states to protect their citizens. But it has not been utilized as a limitation upon the power which sovereign foreign nations possess under international law. That body of law has long recognized that a sovereign government possesses the inherent capacity to act as the official representative of its citizens' claims.

The impropriety of limiting foreign nations by recourse to a body of parens patriae law which has developed for the different purpose of suits by domestic states is further demonstrated by other basic differences between suits by foreign countries and those by domestic states. The international legal rules allowing suits by nations representing their citizens, and the customary international practice of permitting them, are irrelevant to domestic states. Principles of comity arguing for suits by foreign nations are also irrelevant to domestic states. Denial of suit by foreign states can hinder foreign relations, but the same is not true regarding domestic states. Citizens of the United States can themselves bring antitrust suits on their own claims, but as a practical matter many citizens of foreign nations often cannot. And in order to protect the domestic economy against damage arising from antitrust violations in foreign commerce, foreign governments should be permitted to represent their citizens. The same is not true regarding domestic states.

The Standards of the Parens Patriae Cases Are Met When a Foreign Nation Represents the Claims of Its Citizens. Even if a foreign sovereign's right to represent its citizens' antitrust claims were to be judged by the standards of the parens patriae cases concerning domestic entities, a foreign nation still should be able to sue. This is made clear by consideration of the few cases in which the Supreme Court has discussed general parens patriae representation; by the recent decision in *Hawaii v. Standard Oil Co.*,¹⁰⁶ involving a state's suit for antitrust damages to its general economy; and by

recovery is a wholly different one from whether there is an injury which forms the basis of the suit. For a discussion of who keeps the proceeds, see pp. 32-33 *infra*.

106. 405 U.S. 251 (1972).

those cases which have rejected *parens patriae* claims for out-of-pocket damages suffered by citizens of domestic states.

Although infrequently discussed by the Supreme Court, the principles enunciated in the cases permitting *parens patriae* actions indicate that foreign nations would be permitted to sue on behalf of their citizens' antitrust claims. In *Massachusetts v. Mellon*,¹⁰⁷ a suit challenging a federal statute providing funds to states with programs to reduce maternal and infant mortality, the Court, although refusing to permit the state to sue as *parens patriae*, pointed out that the United States could represent its citizens as *parens patriae*.¹⁰⁸ Despite the different context, the *Mellon* rationale would seem to permit a national sovereign, though a foreign one, to sue as *parens patriae* of its citizens. Moreover, in *Georgia v. Pennsylvania Railroad Co.*,¹⁰⁹ the Court permitted a state to sue as *parens patriae* on behalf of its citizens in an antitrust case, because of the state's sovereign interest in the welfare of its citizens.¹¹⁰ Although that case involved only injunctive relief, not treble damage claims, its principle could apply, for if Georgia was permitted to sue to protect its sovereign interest, surely foreign nations, whose sovereign attributes exceed those of domestic states, also have a recognizable sovereign interest in their citizens' welfare.

Foreign nations suing on the antitrust claims of their citizens represent not just a few citizens, but large numbers who have suffered injury because of antitrust violations.¹¹¹ In effect, the foreign governments act as guardians of these citizens' interests. The foreign governments have an independent interest in the case, "an interest apart from that of the individuals affected."¹¹² This independent interest arises because the foreign governments have a proprietary sovereign interest stemming from their loss of foreign exchange funds due to purchases by themselves and their citizens at allegedly monopolistic prices, and because the foreign nations have an independent sovereign interest in ensuring the welfare of their citizens.¹¹³ This interest in their citizens' welfare "is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the

107. 262 U.S. 447 (1923).

108. *Id.* at 486.

109. 324 U.S. 439 (1945).

110. *Id.* at 447-52. Since Georgia owned a railroad, it also asserted a proprietary interest in the suit. The Court, however, dismissed this argument as merely a "make-weight." *Id.* at 450.

111. See generally *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Missouri v. Illinois*, 180 U.S. 208 (1901).

112. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923).

113. See generally *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized in law."¹¹⁴

In *Hawaii v. Standard Oil Co.*,¹¹⁵ the Supreme Court pointed out that the cases established the right of a state to sue as *parens patriae* on behalf of its citizens.¹¹⁶ Thus, said the Court, the question was not whether Hawaii could sue on behalf of its citizens; rather, the question was whether the particular kind of injury claimed by the state, injury to its general economy, was compensable.¹¹⁷ The Court stated several reasons for rejecting the claim for recovery for injury to the general economy. First, such injury would be extremely difficult to measure; second, such a suit would open the door to duplicative recoveries for the same injury.¹¹⁸ The first recovery would be by the state itself for the general economic damage it sustained. The second recovery would be by individual persons who might later bring suit for the specific injuries they sustained which, in the aggregate, comprise the state's general economic injury. Finally, Hawaii's suit was regarded by the Court as unnecessary because nothing prevented private individuals who sustained losses from bringing suit.¹¹⁹

Unlike the State of Hawaii, foreign governments suing on the claims of their citizens are, by definition, not suing for injuries to their general economy. Rather, they are suing for trebled compensatory damages arising from out-of-pocket losses suffered by their citizens due to antitrust violations. Such damages are standard in antitrust cases. While damages to the general economy are difficult to measure and would give rise to duplicative recoveries, trebled compensatory damages for out-of-pocket losses are typically measured in antitrust cases and give rise to no duplicative recoveries. Furthermore, unlike the situation in the *Hawaii* case, there is little realistic possibility that injured foreign citizens or entities can bring suit on their own behalf.

Adverse Precedent. There have been a few lower court cases ruling that domestic states cannot sue as *parens patriae* for out-of-pocket damages

114. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923).

115. 405 U.S. 251 (1972).

116. *Id.* at 257-60.

117. *Id.* at 259.

118. *Id.* at 263-64.

119. *Id.* at 265-66. The Court's view in this regard may not be entirely accurate after its decision in *Eisen v. Carlisle & Jacquelyn*, 417 U.S. 156 (1974), for if the injuries sustained by individuals were small in amount, after *Eisen* they may as a practical matter be precluded from bringing an antitrust suit with its attendant expense. On the other hand, the practicability of suit may depend on how the courts define subclasses. *See id.* at 179-86 (Douglas, J., dissenting in part).

suffered by their citizens¹²⁰ —“quite a different question from that presented in *Hawaii*”¹²¹ —and one upon which the Supreme Court has not passed. The lower court cases have been concerned that *parens patriae* cases lack constitutional due process safeguards for property interests, such as notice for absent class members,¹²² that a *parens patriae* suit would not preclude a later suit on the same claim by citizens since neither the Constitution nor the class action rule permits the extinction of citizens’ rights without necessary procedural safeguards;¹²³ and that there is no injury to business or property as required by section 4 of the Clayton Act.¹²⁴

However, these judicial concerns, even if correctly applied to purely domestic actions (which is certainly debatable), are inappropriate in representative suits by foreign governments. First, it is at least open to question whether antitrust defendants should be permitted to assert the “due process” rights of absent foreign citizens, since the sole interest of antitrust defendants is not to protect those citizens, but to destroy their right, or the right of their government, to collect antitrust damages. To be sure, the Supreme Court has not been very consistent in deciding the standing of a party to assert defenses which in effect are based upon the constitutional rights of others. In some recent cases dealing with first amendment rights,¹²⁵ the Court did not permit such defenses. On the other hand, in *Eisen v. Carlisle & Jacqueline*,¹²⁶ a massive class action alleging antitrust violations, the Court permitted the antitrust defendants to prevail on the argument that failure to give notice to all reasonably identifiable absent class members would deprive those class members of property without due process of law.

120. See, e.g., *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), cert. denied, 414 U.S. 1045 (1973); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057 (E.D. Pa. 1969), aff’d, 438 F.2d 1187 (3d Cir. 1970).

121. *California v. Frito-Lay, Inc.*, 474 F.2d 774, 775 (9th Cir.), cert. denied, 412 U.S. 908 (1973).

122. E.g., *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057, 1062-63 (E.D. Pa. 1969), aff’d, 438 F.2d 1187 (3d Cir. 1970). See FED. R. Civ. P. 23(c)(2), which provides in part:

In any class action maintained under subdivision (b)(3), the Court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

123. See *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057, 1063 (E.D. Pa. 1969), aff’d, 438 F.2d 1187 (3d Cir. 1970).

124. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 126 (9th Cir.), cert. denied, 414 U.S. 1045 (1973).

125. See, e.g., *Parker v. Levy*, 417 U.S. 733 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

126. 417 U.S. 156 (1974).

It is difficult to reconcile the Court's reluctance to approve the assertion of third-party rights in the acutely sensitive first amendment area with permitting the *Eisen* defendants to allegedly protect miniscule third-party property rights. Nevertheless, the domestic cases are readily distinguishable from the official representative actions of foreign governments. In the domestic *parens patriae* cases the absent class members or the states could bring their own class actions. The foreign citizens in foreign cases, however, cannot practically bring suit; it is difficult even for their governments to meet the Rule 23 notice requirements.¹²⁷ Further, it is questionable whether it is appropriate for a United States court to dictate to a sovereign government the method by which it must protect its own citizens, that is, by a class action rather than by a suit in its official representative capacity.

Even if a defendant were allowed to assert the alleged constitutional rights of foreign citizens, the plain fact is that there are no such rights to assert. The Constitution cannot and does not control the relationship between a foreign state and its citizens. Under its own law, as well as international law, a sovereign government can decide that it will litigate and recover upon the claims which its citizens possess under international law or the law of other nations, and that it will keep the proceeds of any recovery.¹²⁸ This is done even by the United States, which is bound by its own Constitution in regard to its relationships with its citizens. To assert that it cannot be done by a foreign sovereign because the foreign national's antitrust claim is his own property which receives protection from the American Constitution is to exalt the Constitution over the foreign sovereign's own law in regard to defining the sovereign's relationships with its own citizens. Not only would this be improper, but in most cases it would not even protect the alleged rights of the foreign citizens. Rather, it would destroy those rights by insuring that there is little practical possibility that suit would be brought.

What has been said above also disposes of any fear that it is improper for a recovery to be used by a foreign state itself. Not only does the United States government itself sometimes keep such recoveries for its own use, but the Constitution clearly does not prevent foreign governments from doing so since it cannot regulate the property or other relationships between a sovereign foreign nation and its citizens.¹²⁹ Furthermore, principles of

127. FED. R. CIV. P. 23(c)(2), *quoted in* note 122 *supra*.

128. *See* authorities cited note 130 *infra*.

129. Indeed, were the constitutional situation otherwise, in cases in which a foreign government itself intended to keep a recovery instead of distributing it to citizens whose claims have been espoused, the United States would not be constitutionally justified in paying claims of foreign nationals which their governments have asserted in international tribunals or diplomatic channels.

international law dictate that a foreign sovereign has absolute discretion in determining what shall be done with a recovery which it obtains in a representative capacity. The *Restatement (Second) of Foreign Relations Law of the United States* and numerous international authorities have long recognized that the state can treat a claim as its own when the damage is to its national welfare and arises under foreign law.¹³⁰

The fact, of course, is that recovery and use of a fund of damages by a foreign nation will inure to the general benefit of its citizens, as exemplified when a nation agrees, as at least one of the Antibiotic Cases' plaintiffs did, to use a recovery to purchase medicines to be distributed to its people. Indeed, the use of a recovery for public purposes has even been approved by one court in regard to domestic states, albeit in a class action suit.¹³¹

There is also no possibility of later suit by foreign nationals on the same claim, so there need be no fear of thwarting judicial efficiency or exposing defendants to double liability on the same claim. For, as a practical matter, most foreign nationals suffer from an inability to bring suit. And as a legal matter, the bringing of suit by a foreign national can cut off its citizens' right to bring suit themselves, since the foreign country can regulate its citizens' property interests without regard to limitations imposed by the American Constitution.

D. Official Representative Suits and Fluid Recovery

A successful suit in an official representative capacity will lead to the recovery of a substantial fund of damages by the plaintiff foreign government. This has led to objections that the recovery would be a form of fluid

130. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 174, comment c at 526 (1965). See also I. BROWNIE, *supra* note 97, at 572; A. ROVINE, *supra* note 98, at 332-34.

Cf. *United States v. Germany*, 7 R.I.A.A. 119 (1924), in which the Mixed Claims Commission wrote that when upon request a nation espouses its national's claim against another nation, the espousing

nation's absolute right to control it is necessarily exclusive. In exercising such control it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken.

Id. at 140.

Although it would occur with relative infrequency, it is possible that a foreign national might wish to represent his own claim and obtain his own recovery. The individual's government could, of course, permit this. But if the government refused to permit it, then the principles discussed above require that the government prevail.

131. *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

recovery, a technique of collecting damages in antitrust cases which the Second Circuit found unauthorized in *Eisen v. Carlisle & Jacquelin*,¹³² and which the Ninth Circuit rejected in *In re Hotel Telephone Charges*.¹³³

Assuming arguendo that fluid recovery is illegal in domestic cases because of various difficulties in identifying and paying individual claimants and because of the consequent creation of a substantial fund which will not go to such claimants,¹³⁴ still official representative suits by foreign nations should be permitted in light of the international law principles which allow a sovereign to obtain and keep damages on the claims possessed by its individual citizens. Furthermore, recovery of a fund of damages by a foreign nation simply does not involve the problems which have caused a few courts to reject fluid recovery in cases brought by domestic parties. These cases have been class actions¹³⁵ in which a full scale trial is to be held without giving notice to most members of the classes, which number in the millions.¹³⁶ There is, of course, no provision in Rule 23 for a (b)(3) class action trial without personal notice to class members who can be identified with reasonable effort, and this has been a primary factor causing the courts to reject fluid recovery.¹³⁷

Under the first stage of the fluid recovery method, a large fund of damages would be created to finance the notification of millions of American consumers that they may have claims which also would be paid from the fund. Claims would then be filed, processed, and paid from the fund, along with counsel fees and general administrative expenses. The processing and filing of millions of individual claims creates insuperable manageability problems which also have been an important factor in the judicial rejection of fluid recovery.¹³⁸ Furthermore, because there also will be millions of

132. 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974).

133. 500 F.2d 86 (9th Cir. 1974).

134. *But see* Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 451, 454 (1973). Additionally, in *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), the court approved a settlement device which entailed fluid recovery.

135. *See, e.g., In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974).

136. The class in *In re Hotel Telephone Charges* numbered 40 million, while the class of odd lot customers in *Eisen* was estimated by the district court to be six million, of whom approximately two million were identifiable. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1008 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974).

137. *See, e.g., Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1015 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974).

138. In *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974), the court thought that processing so many individual claims would be "intolerably time consuming," would involve "a great variety of individual questions," and would be a "gigantic burden on the

plaintiffs who will "have never heard of the case or for other reasons have failed to file claims and have them processed,"¹³⁹ the damage fund will contain a tremendous surplus, and the "principal beneficiaries" of the case "will be the attorneys for the plaintiffs."¹⁴⁰ For this reason, too, fluid recovery has been rejected. The residue after all the payments for claims, counsel fees, and administrative expenses were made would be slated for some sort of related public purpose. But, as in *Eisen*, in which the public purpose would have required the courts to establish brokerage commission rates,¹⁴¹ the courts may not have the legal power to make the decisions necessary to accomplish the suggested purpose.¹⁴² And for this reason, as well, fluid recovery has been rejected.

It is obvious that none of the foregoing circumstances and reasons which have led to the rejection of fluid recovery in domestic cases is present in antitrust suits instituted by foreign nations. Such suits, brought in an official representative capacity recognized by international law, do not depend upon the procedural requirements of the class action rule. They will present no vast manageability problems created by the processing and filing of millions of individual claims. Instead, the fund of damages will be used solely by the plaintiff governments. The attorneys will not be the principal beneficiaries of the fund, since the beneficiaries will be the foreign countries and their citizens. And no court need make any decisions beyond its legal power in order for a foreign nation to use the recovery to carry out public purposes. Such purposes will be carried out under the foreign sovereign's own law.

E. The Alleged Need For Expropriation

The argument that a sovereign foreign government must formally expropriate the claims of its citizens before it can represent them appears to be implicitly based on the notion that the government does not own the claims, and therefore cannot sue on them, until it expropriates them. But whatever its implicit basis, the argument is clearly wrong.

As previously indicated, international law gives a sovereign nation total

Court's resources beyond its capacity to manage or effectively control." *Id.* at 91. The Court of Appeals in *Eisen* took essentially the same view. *See* 479 F.2d at 1016.

139. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1010 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974).

140. *Id.* at 1019.

141. *See id.* at 1011.

142. At the district court level, Judge Tyler thought that he had such authority, but recognized that the proper way to accomplish any change in commission fees was "under SEC supervision or at least with SEC approval." *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 265 (1971). However, the Court of Appeals felt that the district court did not have authority to decide commission rates. 479 F.2d at 1011.

discretion over whether to represent its citizens' claims,¹⁴³ and there is no authority whatsoever for the proposition that a nation must first formally expropriate them. Indeed, the alleged need for expropriation prior to representation is wholly absurd, since it would mean that expropriation is the necessary precursor every time a sovereign decides to assert the claims of its nationals before an international body such as the World Court or before the instrumentalities of another nation. Common sense and experience inform one that this is simply not the way things are done.

It is noteworthy that the argument of an alleged need for expropriation has not been raised by the foreign citizens whose claims have allegedly been "taken", as has occurred in cases in which the question of taking was *properly* brought up.¹⁴⁴ Rather, here the argument is raised by antitrust defendants who thereby seek to avoid liability to *any* party, be it the alleged "takee" or the alleged "taker". In this respect, the result of the expropriation argument is identical to the constitutional due process argument discussed earlier; it is merely a means of seeking to retain monies obtained through violation of law. Rather than protecting the claims of foreign citizens, it would destroy the practical possibility that there could be any recovery for most such claims.

Finally, in direct contradiction to the argument that recovery cannot be had without a prior formal expropriation, it has also been argued that a foreign government could not represent its citizens' claims even if it *had* expropriated them. This argument runs as follows: ordinarily the act of state doctrine would preclude an American court from examining the validity of a foreign government's formal taking of the property of its citizens. However, because a claim for antitrust damages is collectible only in the United States, it constitutes property located in the United States. Since such property is located in the United States, the act of state doctrine is inapplicable and an American court can make its own determination as to whether to enforce the formal taking. Here it should not be enforced because "confiscation of assets has been said to be 'contrary to our public policy and shocking to our sense of justice.'"¹⁴⁵

This argument is wrong even aside from the fact that a foreign nation need not expropriate claims in order to represent them. Even when property located in the United States is expropriated by a foreign nation, American courts will enforce the expropriation, without any need to rely upon the act

143. See notes 128-30 & accompanying text *supra*.

144. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

145. *Republic of Iraq v. First Nat'l Bank*, 350 F.2d 645 (7th Cir. 1965), *cert. denied*, 382 U.S. 942 (1966).

of state doctrine, if the expropriation is not inconsistent with American law and policy.¹⁴⁶ Representative suit on antitrust claims by foreign nations is consistent with the public policy or law of the United States because it is specifically designed to carry out antitrust law and policy. As stressed before, foreign nationals are "persons" with claims under section 4, but as a practical matter usually cannot bring suits themselves to enforce their claims, and therefore claims will go unremedied unless championed by their governments. Such preservative action thus comports with and carries out the legislative policy which gave foreign nationals a claim in the first place and which sought to protect United States foreign commerce.

Nor can it be maintained that representative suit should be denied as contrary to American constitutional policy. The United States Constitution cannot regulate the property relationships between foreign nations and their citizens. Nor has it ever been suggested that the American Constitution can or does prevent a sovereign foreign government from representing claims of its citizens which would otherwise go unremedied. To prevent a sovereign government from representing claims which would otherwise die would not prevent the expropriation of valuable property.¹⁴⁷ Instead, such action

146. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 43, comment *e* at 142 (1965), in which it is stated:

General acts of a foreign state that purport to affect property or other interests located or localized in the United States are not always refused effect by courts in the United States. Courts have given effect to such acts where, after examination, they are found to be not inconsistent with the public policy or law of the United States. In such a case the court does not apply the act of state doctrine.

Of course, it is highly debatable as to whether a foreign citizen's antitrust claim is located abroad, where the citizen lives, or in the United States, where suit can be brought. American courts generally follow the rule that intangible property such as a legal claim is located where it can be collected, but not all nations follow this rule. If it were determined that the situs of antitrust claims is in the foreign nation in which the foreign citizens who possess the claims live, then the act of state doctrine would clearly bar a court from examining a foreign nation's decision to "take" its citizens' claims and represent them in United States courts. Such a decision would be an action taken by a foreign government in its own territory with respect to property located within its territory and, in such circumstances, the act of state doctrine requires the court to honor the foreign sovereign's decision.

147. Even in regard to property owned by American citizens, the United States Constitution bars an alleged taking only when the property has value in the hands of its owner. There is no offense when the property right has no value to its owner and American courts have often permitted legislators to extinguish certain property interests such as rights of reverter which have little value to their holders. See *e.g.*, *Trustees of Township No. 1 v. Batdorf*, 6 Ill. 2d 486, 130 N.E.2d 111 (1955). Since property interests of Americans can be totally extinguished in such circumstances, a fortiori the Constitution cannot preclude a foreign government from bringing a representative suit to prevent total extinction of the possibility of recovery on a claim which in effect has no value to its owner because he has no practicable possibility of instituting his own suit.

would itself destroy the value of the property by ensuring that suit in pursuit of the claims will be impossible as a practical matter.

In sum, far from being contrary to our public policy, representative suit furthers these goals. What should be seen as against our national interests is the use of ill-founded arguments to avoid all liability for antitrust violations that harm foreign nationals.

IV. CONCLUSION

The question of whether a foreign nation can sue under the antitrust laws for damages suffered by itself and its citizens is both highly important and intellectually interesting. It involves numerous vital points of antitrust law and economics. Due to the great importance of the matter and the ongoing litigation, judicial resolution of the issues may be expected in the near future. In my judgment, an answer which allows suit by foreign nations would be beneficial to the regime of competition which is the foundation stone of the American economy.

ADDENDUM

The Eighth Circuit's Decision On The "Person" And Official Representative Issues

On August 27, 1975, while this article was being prepared for publication, the United States Court of Appeals for the Eighth Circuit delivered a decision on the "person" and official representative issues after appeals from the Minnesota district court's rulings.¹⁴⁸ The Court of Appeals did not rule on whether a foreign government is a "person" under the antitrust laws. Instead, it said that this issue could not be brought before it by petition for writ of mandamus, which was the procedural route utilized by the appellants after the district court had refused to certify an interlocutory appeal on the question. However, the Court of Appeals did decide the merits of the official representative and *parens patriae* issues which were before it on certified interlocutory appeal, ruling against the foreign governments. Since the principal arguments supporting participation of foreign governments in antitrust suits as official representatives have been set out in the body of this article, this addendum will focus primarily on a description of the Eighth Circuit's decision. There will be, however, limited comment in footnotes on some of the more important aspects of the court's opinion.

The court, treating the official representative and *parens patriae* issues as a single question, began its analysis by noting that *parens patriae* capacity

148. *Chas. Pfizer & Co. v. Lord*, Civil No. 74-1680 (8th Cir., Aug. 27, 1975).

had traditionally been limited to certain narrow areas. In the United States the *parens patriae* prerogative allowed a state to sue for the general welfare of its citizens at large in order to protect the state's quasi-sovereign interests. According to the court, quasi-sovereign interests exist apart from the interests of particular individuals who may be affected, and are different from the state's proprietary interests. Suits to enforce such interests have generally been limited to those involving the physical environment, as in suits to enjoin nuisances such as interference with the flow of natural gas, diversion of water or discharge of sewage, and have generally involved injunctive relief rather than damages.¹⁴⁹

The separateness of a state's quasi-sovereign interests from the interests of individuals was elaborated upon in a lengthy footnote devoted to a discussion of *Oklahoma v. Atchison, Topeka & Santa Fe Railroad Co.*¹⁵⁰ In that case, Oklahoma sought to assert the right of shippers against a common carrier and it was not allowed to do so because it was not asserting wrongs to its own powers or injuries to its own property, but was seeking to recompense damage done to some of its people.

The court next noted that the interest relied upon by the foreign governments was different from those previously recognized in *parens patriae* suits. The foreign governments, it ruled, were not asserting a quasi-sovereign interest but rather were only seeking to protect proprietary interests which would seem to give them standing to bring a class action on behalf of their citizens. As to a foreign government's ability to bring such an action, the court assumed, without deciding, that a foreign government would be a "person" under the antitrust laws.

Although the foreign governments had asserted that a class action is not financially feasible under the Supreme Court's decision in *Eisen*, the court stated it would not expand the concept of *parens patriae* to enable foreign governments to sue on behalf of persons who are legally entitled to sue but unable to do so as a practical matter, basing its decision on the fact that domestic states have not been permitted to bring such suits in recent decisions, and that, in the *Hawaii* decision, the Supreme Court expressed a strong preference for class actions. In support of this view, the Eighth Circuit

149. While the court's discussion of the historical use of suits to protect quasi-sovereign interests is certainly correct, it is difficult to understand how such an action would not lie when the sovereign is attempting to protect its citizens in their obtaining and paying for life-giving medicines. It would seem clear that whether the government is protecting the physical environment or the individual citizen, it is acting to guard the public health and welfare. Whether it does so by seeking an injunction to prevent injury or damages to redress injury should not determine the ability to bring suit.

150. 220 U.S. 277 (1911).

extensively quoted language from *Hawaii* stating that private citizens are not powerless to bring antitrust actions and that class actions are preferred to *parens patriae* cases in the antitrust area because Rule 23 of the Federal Rules of Civil Procedure provides rules regarding the appropriate class and also prevents duplicate recoveries.

In further support of this preference for class actions, the Eighth Circuit quoted extensively from a decision by Judge John Lord of Philadelphia,¹⁵¹ who said that *parens patriae* actions would in various ways allow states to circumvent the restrictions to which class action plaintiffs are subject under Rule 23, and would undermine the aims of the rule by negating its safeguards for absent parties.¹⁵² The Eighth Circuit indicated that these decisions regarding domestic entities are not inapplicable merely because the plaintiffs are foreign governments. In the court's view, principles of comity, international law, and treaties do not afford foreign parties access to American tribunals on a different or more favorable basis than is granted to domestic parties.¹⁵³ Rather, foreign parties should be afforded only the same access as American entities and, as the Supreme Court observed in the 1883 case of *New Hampshire v. Louisiana*,¹⁵⁴ no principle of international law requires a nation to assume the collection of its citizens' claims against another nation if the citizens themselves have ample redress.¹⁵⁵

In addition, the appellate court indicated that the district court may have been in error in ruling that the due process clause of the fifth amendment does not entitle foreign nationals to notice and an opportunity to participate in or exclude themselves from the litigation. While the court agreed that the American Constitution cannot bind foreign governments in their relationship with their nationals, it noted that nonresident aliens nonetheless may be entitled to due process when their rights to property located in the United States are litigated in American courts. However, the court stated that it was unnecessary to decide the due process question since, when foreign governments invoke the aid of American courts to deal with tangible or intangible

151. The cited case was *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057 (E.D. Pa. 1969), *aff'd*, 438 F.2d 1187 (3d Cir. 1970).

152. 309 F. Supp. at 1063.

153. The court also recognized, however, that foreigners must not be given inferior access. This raises an interesting legal point in light of activity in Congress toward legislation which would allow domestic states to sue as *parens patriae* for antitrust injuries suffered by their citizens. Should such a bill be enacted, the principles recognized by the Eighth Circuit would seem to grant foreign sovereigns the right to sue as *parens patriae* as well.

154. 108 U.S. 76 (1883).

155. *Id.* at 90.

property located here, their actions will be upheld only if consonant with American law and policy. Taking the Supreme Court's preference for class actions in *Hawaii* and its delineation of exacting notice requirements under Rule 23 in *Eisen* as indicative of United States policy, the court held that it would be inconsistent with United States law and policy to permit a *parens patriae* action even if the cost of a class action would be prohibitive and would render the claims unenforceable.¹⁵⁶

In conclusion, the court stated that the remedy plaintiffs desire, if it can be made available at all, must come from Congress, since Congress is best able to weigh the economic and political consequences and to consider alternative means of enforcing the antitrust laws. In this regard, the court quoted extensively from the Second Circuit's opinion in *Eisen*,¹⁵⁷ in which Judge Medina said that statements about "disgorging" money from wrongdoers or about "prophylactic effects" or about "providing a remedy for the ills of mankind" do not solve specific legal problems, and that punishment of wrongdoers is provided for in particular ways and should not be done by watering down procedural safeguards of the Constitution, statutes or Rule 23 since such procedural safeguards are an important protection against oppression.

The Eighth Circuit ended, however, by noting that nothing in the opinion should be construed to prevent the foreign nations from representing their citizens in a class action if the district judge determines that a class should be certified, and by ordering dismissal of the official representative and *parens patriae* claims.

156. In so defining United States policy, the Eighth Circuit expressed a preference for upholding procedural requirements to the detriment of important substantive policies contained in the antitrust laws. Since a decision in favor of the foreign governments would have been clearly consistent with antitrust law and policy, it must be questioned whether it is either proper or permissible for courts to favor procedural requirements over substantive law when the result is not to protect property but, as here, to negate the value of property since the small size of the individual claims coupled with other considerations means that no recovery will be had by any of the wronged parties.

157. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974).